NO. 43113-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MAXPHIL LAUE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Leila Mills, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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1. Exclusion of relevant and admissible evidence infringed upon appellant's constitutional right to present a complete defense.

2. The trial court exceeded its authority when it ordered appellant to submit to polygraph testing for the remainder of his life.

3. The court exceeded its authority in prohibiting appellant's use of computers, cell phones, and the internet because those prohibitions are not crime related.

4. The community custody condition prohibiting the possession of pornography is unconstitutionally vague and must be stricken.

Issues pertaining to assignments of error

1. Appellant was charged with first degree rape of a child based solely on allegations made more than six years after the alleged incidents occurred. The defense offered the record from a medical examination of the child conducted around the time of the incidents to show that there was no indication of sexual abuse, but the court excluded the evidence. Where the records custodian would testify to the standard procedures under which the record was created, and where the child's failure to report abuse during the exam was relevant to the credibility of

her later allegations, did the court's exclusion of the evidence infringe on appellant's right to present a defense?

2. The Washington Supreme Court recently held that a court may order an offender to submit to compulsory polygraph examinations only when specifically authorized by statute. In re Detention of Hawkins, 169 Wn.2d 796, 803, 238 P.3d 1175 (2010). Where the applicable sentencing statute does not specifically authorize the court to order polygraph examinations as a condition of community custody, must that condition be stricken from appellant's sentence?

3. Where the community custody conditions prohibiting access to the internet, computers, or cell phones are not directly related to the circumstances of the crime, must those conditions be stricken from appellant's sentence?

4. The Washington Supreme Court has held that a community custody condition prohibiting possession of pornography is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). Must the conditions relating to pornography be stricken from appellant's sentence?

B. STATEMENT OF THE CASE

1. Procedural History

On July 11, 2011, the Kitsap County Prosecuting Attorney charged appellant Maxphil Laue with one count of first degree rape of a child. CP 1-5; RCW 9A.44.073. A second count was added by amended information. CP 6-9. The case proceeded to jury trial, but the jury was unable to reach a verdict, and the court dismissed count II for insufficient evidence. CP 34-35. The case was tried again before the Honorable Leila Mills, and the jury returned a guilty verdict. CP 55. The court imposed a sentence of 119 months to life, and Laue filed this timely appeal. CP 100, 119.

2. Substantive Facts

Maxphil Laue was charged with first degree rape of a child in 2011 after then-11 year old K.G.-C. alleged that Laue had raped her when she was five years old. CP 1-5. From March through June 2005, Kim Johnson, Laue's girlfriend, babysat K.G.-C. and her younger brother at her residence in the home of K.G.-C.'s grandmother. 2RP[1] 163, 177. K.G.-C. claimed that almost everyday that she was there, Kim would take a nap.

[1] The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—1/3, 4, 5/12; 2RP—1/9, 10/12; 3RP—1/10/12 (verdict); 4RP—2/17/12.

While Kim was sleeping Laue would show K.G.-C. sexually explicit videos and then lick her vagina and she would lick his penis. 2RP 120-22.

K.G.-C. never told Kim or her parents about these incidents when they occurred, nor did she go upstairs and tell her grandmother, who was always at home. 2RP 123, 138, 141, 164, 187, 210. But when she was 11 years old she was watching an episode of "Oprah" or "Dr. Phil" with her mother when a celebrity guest disclosed that she had been raped by her brother. 2RP 126-27. K.G.-C. then told her mother that Laue had raped her when she was at Kim's house. She repeated her allegations to a school counselor. 2RP 124.

Prior to trial, the defense moved to admit a copy of the medical record of K.G.-C.'s well-child checkup in June 2005 under the business record exception to the hearsay rule. 1RP 29-30, 37-38; Exhibit 15. Counsel argued that the record was relevant because it was made around the time of the alleged incidents, yet there was no indication in it that K.G.-C. reported any sexual abuse. 1RP 33-34.

Although the medical provider who had examined K.G.-C. and made the record was deceased, counsel explained that her supervisor was available to testify as the custodian of records that the record was made in the regular course of business. 1RP 32. He would testify about the standard procedure for conducting and documenting a well-child

examination. 1RP 32. He would also testify that if any there was any indication of abuse during the exam, the standard practice was to discuss good touch/bad touch with the child and refer the case to the prosecutor's office sexual assault unit or CPS. 1RP 34-35. Counsel argued that the fact that the medical record does not address the issue demonstrates that K.G.-C. did not disclose any information about sexual abuse, or give the provider any reason to inquire further, during the exam. 1RP 36-37.

The court denied the defense motion and excluded the medical record. It found that the record was not relevant to whether the alleged abuse occurred, because the supervisor could not testify from personal knowledge about what was said during the exam. 1RP 45.

The jury returned a guilty verdict, and the court imposed a sentence of 119 months to life. CP 100. The court ordered numerous non-mandatory conditions of community custody over objection from the defense, including the requirement that Laue submit to polygraph examination and prohibitions on possessing or accessing the internet, computers, cell phones, and pornography. CP 103, 111; 4RP 15.

C. ARGUMENT

1. EXCLUSION OF K.G.-C.'S MEDICAL RECORDS INFRINGED UPON LAUE'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

Both the state and federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

In this case, the trial court excluded K.G.-C.'s medical record, finding that it was not a properly authenticated business record and it was not relevant to the charged offense. The court was wrong on both counts.

Under the business records exception to the hearsay rule, RCW 5.45.020, a record kept in the ordinary course of business may be admitted to prove the act, condition or event recorded:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. The trial court's decision whether to admit records under this exception is reviewed for an abuse of discretion. State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990); State v. Garrett, 76 Wn. App. 719, 722, 887 P.2d 488 (1995).

Medical records fall within the purview of this statute. So long as the records are made in the regular course of business and are properly identified and otherwise relevant, the records constitute competent evidence of the facts contained therein. Ziegler, 114 Wn.2d at 538-39. Moreover, the medical provider who prepared the record need not testify in order for the record to be admissible. Rather, the record may be presented through the custodian or person who supervised its creation.

Garrett, 76 Wn. App. at 724; see also Ziegler, 114 Wn.2d at 538-40 (partner of physician who examined patient permitted to testify from common medical file because record was made in the ordinary course of business and maintained in the clinic's custody); State v. Alexander, 64 Wn. App. 147, 156-57, 822 P.2d 1250 (1992)(supervising physician was qualified to testify to a medical report prepared under her direction); State v. Heggins, 55 Wn. App. 591, 596, 779 P.2d 285 (1989)("[t]he testifying witness need not have conducted nor personally observed all of the tests or measurements contained in the report, so long as it was prepared under the witness' supervision.").

In Garrett, a child was examined in the emergency room after reporting that the defendant had raped her. Garrett, 76 Wn. App. at 721. The record of this examination was signed and dated and made a part of her common medical file. The practitioners who examined the child in the ER and prepared the records were not called as witnesses at trial. Instead, the child's treating physician testified that she was familiar with the examination and testing procedures used in the ER and she routinely relies on such medical reports prepared in the ER. This testimony sufficiently authenticated the medical records, making them admissible under the business records exception. Garrett, 76 Wn. App. at 722-23, 725.

Here, the trial court excluded the record of K.G.-C's well-child exam from June 2005, because the medical provider who conducted the exam and prepared the record was unavailable to testify. 1RP 45. Since the record could be authenticated by another witness, however, the court's reasoning is untenable. As in Ziegler, the record in this case would be presented through the custodian, who would testify that it was prepared contemporaneously with the well-child examination and kept in the regular course of business. As in Heggins and Alexander, the authenticating witness was the provider's supervisor and the record was made under his supervision. And as in Garrett, he was familiar with the standard procedures for conducting examinations and preparing records. 1RP 32-38. The fact that the witness did not make the record is not a valid basis for excluding that evidence.

The court also found that the record was not relevant, because it did not indicate whether sexual abuse was discussed. 1RP 45-46. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. As trial counsel argued, standard procedure required the provider to document and follow up on any indication of sexual abuse. 1RP 36-38. The fact that the record does not refer to any concerns about sexual abuse is in itself relevant, because the

child's failure to report abuse during a medical exam conducted around the time of the alleged incidents calls into question her allegation, made six years later, that she was raped. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987). The court's exclusion of the medical record on the grounds that it was irrelevant was error.

Because the court's erroneous ruling infringed on Laue's constitutional right to present a complete defense, it is presumed prejudicial unless the State proves beyond a reasonable doubt that the error was harmless. Maupin, 128 Wn.2d at 928-29. The State cannot meet its burden here. The case against Laue rested solely on the credibility of K.G.-C.'s testimony that Laue raped her several years earlier. The fact that she made no contemporaneous allegations calls the credibility of her testimony into question. Although the jury learned that K.G.-C. did not report any abuse to family members at the time it allegedly occurred, the fact that she gave no indication of abuse during a well-child exam could have tipped the scales on the credibility issue. Because the State cannot show beyond a reasonable doubt that the court's

erroneous exclusion of this evidence was harmless, Laue's conviction must be reversed.

2. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT ORDERED LAUE TO SUBMIT TO POLYGRAPH TESTING FOR THE REMAINDER OF HIS LIFE.

A defendant convicted of first degree rape of a child committed between 2004 and 2008 must be sentenced under former RCW 9.94A.712[2]. See RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."). That statute requires the court to determine a maximum and minimum sentence and sentence the offender to community custody for any period of time the offender is released from total confinement before the expiration of the maximum sentence. The statute also sets forth conditions of community custody a court is authorized to impose. Under former RCW 9.94A.712(6)(a) the trial court may order the defendant to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

The court below imposed a minimum sentence of 119 months and ordered community custody for the remainder of Laue's life. CP 100,

[2] Recodified as RCW 9.94A.507 in 2009.

102. As a condition of community custody, the court ordered Laue to submit to polygraph examinations to monitor compliance with crime-related prohibitions and law-abiding behavior. CP 111. Trial counsel objected to this condition, arguing that the Washington Supreme Court had recently held that polygraph examinations could be ordered only when specifically authorized by statute. Because the sentencing statutes do not specifically authorize polygraph examinations, the court could not impose that community custody condition. CP 69-71; In re Detention of Hawkins, 169 Wn.2d 796, 238 P.3d 1175 (2010).

In Hawkins, the Court examined whether a sex offender could be compelled to submit to a polygraph examination when taken into custody by the Department of Social and Health Services for evaluation as to whether he is a sexually violent predator, pursuant to RCW 71.09.040(4). Hawkins, 169 Wn.2d at 800. The Court determined that the State was prohibited from compelling polygraphs in that situation. Hawkins, 169 Wn.2d at 801.

First, the Court noted that when interpreting a statute, its objective is to carry out legislative intent, while keeping in mind that statutes which involve a deprivation of liberty must be strictly construed. Hawkins, 169 Wn.2d at 801. Next, the Court stated

> The legislature is undoubtedly aware of the unique difficulties posed by polygraph examinations. We presume that the legislature is aware of long-standing legal principles. This is particularly true in the case of polygraph examinations, which the courts have consistently recognized as unreliable and, unless stipulated to by all parties, inadmissible.... This is the backdrop against which the legislature drafts its laws.

Hawkins, 169 Wn.2d at 802 (citations omitted). The Court further noted that polygraph examinations are invasive and implicate constitutional privacy concerns, a point of which "the legislature is surely aware." Hawkins, 169 Wn.2d at 803.

The Court concluded that "Because the legislature is undoubtedly aware of the inherent problems with polygraph examinations, it is fair to infer that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use." Hawkins, 169 Wn.2d at 803[3]. This conclusion was confirmed by the fact that the legislature has specifically permitted compulsory polygraph examinations elsewhere in the statute. Hawkins, 169 Wn.2d at 804 (citing RCW 71.09.096(4)). Applying these principles of statutory interpretation to the statute at issue in that case, the Court held that because RCW 71.09.040(4)

[3] In State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), the Supreme Court held that polygraphs could be ordered as a sentencing condition. It reasoned that polygraphs have been recognized as a useful investigative tool, and an amendment to the sentencing statute authorizing the court to order affirmative acts to monitor compliance suggested the legislature intended to confirm the use of testing such as polygraphs. Riles, 135 Wn.2d at 342-43. Although the Court in Hawkins did not address Riles, its holding that compelled polygraphs are permitted only when specifically authorized by statute appears to overturn Riles.

does not specifically permit compelled polygraph examinations, they are prohibited. Hawkins, 169 Wn.2d at 803.

While the Court in Hawkins framed the issue and holding in terms of RCW 71.09.040(4), its analysis applied more general principles of statutory interpretation, and nothing in the decision limits the analysis to that statute. As recognized in Hawkins, the legislature is aware that polygraphs are intrusive and unreliable, statutes involving a deprivation of liberty must be strictly construed, and when the legislature intends to authorize polygraphs it does so specifically. Applying these principles to the community custody statute it is clear that, because the legislature has not specifically authorized compelled polygraphs as a condition of community custody, they are prohibited. The trial court exceeded its authority in ordering that Laue submit to polygraph examinations for the remainder of his life, and that condition must be stricken from Laue's sentence.

3. THE COURT EXCEEDED ITS AUTHORITY IN PROHIBITING LAUE'S USE OF COMPUTERS, CELL PHONES, AND THE INTERNET BECAUSE THOSE PROHIBITIONS ARE NOT CRIME RELATED.

As conditions of Laue's community custody, the court below prohibited Laue from owning or accessing a computer, a cell phone, or the

internet without prior approval from his CCO. CP 111. These conditions are invalid because they are not directly related to the crime in this case.

Under the sentencing statute applicable here, the court may order Laue to "comply with any crime-related prohibitions." Former RCW 9.94A.700(5)(e) (2003). In order to be valid, a condition of community custody that prohibits conduct must be crime-related. State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). A condition is crime-related only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10).

In O'Cain, the Court of Appeals found that a condition prohibiting the defendant from accessing the internet without prior approval from his CCO or treatment provider was not crime related, and it ordered the condition stricken. O'Cain, 144 Wn. App. at 773. There, the defendant was convicted of second degree rape, but there was no evidence that he accessed the internet before the rape, that he used the internet to lure a victim to an illegal sexual encounter, or that internet use contributed in any way to the offense. O'Cain, 144 Wn. App. at 775.

Similarly here, while K.G.-C. testified that Laue showed her a sexually explicit video, there is no evidence that Laue accessed the internet to obtain that video. Moreover, this is not a case in which the defendant met the victim and arranged the circumstances of the offense

via the internet. There was no evidence that use of the internet, computers, or cell phones contributed in any way to the offense. Because the prohibitions imposed here are not crime related, they are invalid and must be stricken.

4. THE CONDITION PROHIBITING THE POSSESSION OF PORNOGRAPHY IS UNCONSTITUTIONALLY VAGUE AND MUST BE STRICKEN.

The due process provisions of the state and federal constitutions require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness that an ordinary person can understand what is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The court below ordered Laue to possess or access no pornography, as defined by the CCO. CP 103, 111. Our Supreme Court has already held that a community custody condition restricting access to or possession of pornography is unconstitutionally vague. Bahl, 163 Wn.2d at 758. The fact that such a condition relies on the CCO to define pornography "only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable

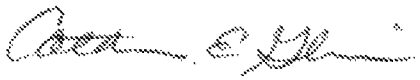
standards for enforcement." Bahl, 164 Wn.2d at 758. The community custody conditions referring to pornography are unconstitutionally vague and must be stricken.

D. CONCLUSION

The court's erroneous exclusion of relevant admissible evidence infringed on Laue's right to present a complete defense, and his conviction must be reversed and the case remanded for a new trial. In addition, the community custody conditions requiring Laue to submit to polygraphs and prohibiting the use of computers, cell phones, and the internet are not authorized by statute, and the condition regarding pornography is unconstitutionally vague. These conditions must be stricken from Laue's sentence.

DATED this 30th day of July, 2012.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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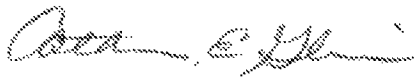

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